

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	Docket#
JENNIFER HOUGH,	: 21-cv-04568 (ENV) (JRC)
	:
Plaintiff,	:
	:
- versus -	: U.S. Courthouse
	: Brooklyn, New York
MARAJ, ET AL.,	:
	: January 20, 2022
Defendants	:
-----X	

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE JAMES R. CHO
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(VIA VIDEO/AUDIO)

For the Plaintiff:

Tyrone A. Blackburn, Esq.
T.A. Blackburn Law, PLLC
1242 East 80th Street, 3rd Fl.
Brooklyn, NY 11236

Steven N. Gordon, Esq.
Tsyngauz & Associates, P.C.
114 Mulberry Street
New York, NY 10013

For the Defendant:

Steven David Isser, Esq.
Law Offices of Steven D. Isser
424 Madison Avenue, Third
Floor
New York, NY 10017

Transcription Service:

Transcriptions Plus II, Inc.
61 Beatrice Avenue
West Islip, New York 11795
RL.Transcriptions2@gmail.com

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1 THE COURT: All right. Good morning, everyone.
2 We're here for a conference in *Hough v. Maraj*, case
3 number 21-CV-4568.

4 Can the parties give their appearances for the
5 record starting with plaintiff?

6 MR. BLACKBURN: Tyrone Anthony Blackburn, T.A.
7 Blackburn Law, PLLC, for plaintiff.

8 MR. GORDON: Steven Gordon, Tsyngauz &
9 Associates, for plaintiff. And I also have my law
10 student extern here, (indiscernible).

11 LAW STUDENT: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. ISSER: Good morning, your Honor. Steven
14 Isser, Law Offices of Steven D. Isser for the defendant
15 Kenneth Petty.

16 THE COURT: All right. Good morning everyone.
17 So there are two motions we want to address today and
18 I'll hear argument on both. First, plaintiff's motion
19 for default against Defendant Petty and Defendant Petty's
20 motion to vacate the entry of default.

21 All right. But before I get to that, anything
22 you want to address before we hear arguments on the
23 motion, Mr. Blackburn?

24 MR. BLACKBURN: No, sir.

25 THE COURT: All right. How about for you, Mr.

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1 Isser?

2 MR. ISSER: I would just like to state for the
3 record, your Honor, that you know, Defendant Maraj had a
4 similar motion and they've been let out of the case but
5 I'd like to adopt all the arguments made in Ms. Maraj's
6 motion which are not inconsistent with my client's
7 position.

8 THE COURT: Okay. Understood. So why don't I
9 hear argument on the motion for default first. Mr.
10 Blackburn, do you want to be heard?

11 MR. BLACKBURN: I believe Mr. Gordon is going
12 to take the lead on this.

13 THE COURT: Okay. Go ahead.

14 MR. GORDON: I'm here, your Honor. So as you
15 know, this case arises out of an unfortunate and heinous
16 event on September 16, 1994 where plaintiff was violently
17 raped by the defendant who was subsequently charged with
18 first degree rape. And as a deal for a reduced sentence,
19 he pled to attempted rape in the first degree and served
20 approximately four years.

21 Our client for years has dealt with the
22 emotional damage and as well as the physical damage that
23 occurred on that very day and it has permeated every
24 facet of her life. Ms. Hough never had any intention of
25 seeking any sort of civil damages from Defendant Petty.

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1 However, after Defendant Petty and former defendant in
2 this, Defendant Maraj orchestrated a scheme in order to
3 convince or threaten and coerce Ms. Hough into recanting
4 her story after Mr. Petty was arrested for failing to
5 register as a sex offender on March 5th.

6 The time in which Defendant Petty was arrested
7 and contacted Ms. Hough through one of his associates in
8 his gang, the Makk Ballers, was only three days.

9 Defendant Petty was arrested on March 5, 2020. On March
10 8, 2020 Barry Dukes, a.k.a. Black, contacted Ms. Hough
11 and did not immediately state that it was for the purpose
12 of what occurred in 1994 for her to recant her story, but
13 in time and throughout that da he brought up that
14 incident and Ms. Hough expressed that she wanted it to
15 just go away. And Black said that he could help her do
16 that.

17 The very next day Black, and this is
18 undisputed, texted Ms. Hough Ms. Maraj's phone number
19 which was provided by Mr. Petty. And Mr. Petty concedes
20 that this occurred. On that phone call, Ms. Maraj
21 attempted to convince our client to recant her story,
22 which she declined. And after that, a series of
23 threatening acts and bribes.

24 Now, on August 13, 2020 our client --

25 THE COURT: Mr. Gordon, let me stop you for a

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1 minute there.

2 MR. GORDON: Yes.

3 THE COURT: I'm quite familiar with the
4 underlying facts of the case. I want to hear argument on
5 your motion for default judgment. Why do you think
6 you're entitled to a default judgment in this case?

7 MR. GORDON: Your Honor, we believe we are
8 entitled to a default judgment because the defendant
9 clearly or apparently willfully failed to timely respond
10 to the complaint because it would gain him an advantage
11 in his criminal case. By not responding to the complaint
12 and not having to give any admissions or denials or any
13 subsequent admissions or denials in discovery, he was
14 essentially shielding himself from any adverse effects in
15 this criminal case. The case law is clear that where a
16 defendant has strategically failed to respond to gain an
17 advantage in a civil case that willfulness is fact.

18 The defendant does not deny having knowledge of
19 the lawsuit nor his time to respond. The summons very
20 clearly stated when it was served on him that he has 21
21 days after service of the summons and he must serve the
22 plaintiff in answer to the attached complaint or a motion
23 under Rule 12. It even says at the very bottom if you
24 fail to respond, judgment by default will be entered
25 against you for the relief demanded in the complaint.

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1 Defendant Petty offers no excuses except that
2 there was some sort of miscommunication between his wife,
3 not even him, and her attorney as well as he did not want
4 to pay. So he actually is conceding that he
5 intentionally did not pay for an attorney to respond to
6 the complaint timely because he could not find one that
7 was not supposedly demanding a \$100,000 retainer.

8 This is not a sufficient excuse. Defendant
9 Petty offers no documentary evidence that there was any
10 sort of miscommunication between Defendant Maraj and her
11 attorney. There is no proof that Defendant Petty, and he
12 does not deny, could not have entered an appearance on
13 his own or asked one of his at least four attorneys at
14 the time to seek an extension. There is absolutely no
15 excuse for Defendant Petty failure to timely respond.
16 And the only conclusion that could be drawn is that it
17 was willful.

18 Secondly, Defendant --

19 THE COURT: Mr. Gordon, let me ask you a
20 question based on something you just said. You mentioned
21 that they didn't ask for an extension of time. If they
22 had reached out to you and asked for more time, would you
23 have given them the additional time to respond?

24 MR. GORDON: Your Honor, during the period in
25 which they had to respond, I wasn't on the case, but if I

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1 had been on the case, yes, I would have given them an
2 extension.

3 THE COURT: Okay. And how much time would you
4 have given them?

5 MR. GORDON: I would have given them at least
6 30 days.

7 THE COURT: Okay. All right. So his answer
8 was due by presumably October 6th, is that right?

9 MR. GORDON: Yes, yes.

10 THE COURT: So you would have given them an
11 extension until November 6 to respond?

12 MR. GORDON: Yes.

13 THE COURT: Okay. Well, according to my papers
14 it looks like defense counsel filed an appearance on --
15 what day is that? October 25th. And wrote to the Court
16 also on October 25th as well. So within 30 days if you
17 had given them additional time to respond.

18 So help me understand why are we here on a
19 default proceeding --

20 MR. GORDON: Because --

21 THE COURT: -- if you would have given them
22 more time?

23 MR. GORDON: -- even if I would have given them
24 more time, it still does not excuse a willful default.
25 You know, Defendant Petty still had to respond timely and

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1 he cannot deliberately choose not to respond in order to
2 gain an advantage in this case, to gain an advantage in
3 his criminal case. I think the facts are clear that
4 that's what occurred. There's no other reason why,
5 there's no reasonable excuse or good cause as to why he
6 did not timely respond.

7 THE COURT: Understand, I understand that, but
8 you keep referring to a criminal case. This is a civil
9 case that we're on. Right? And so whatever advantage
10 he's seeking to gain doesn't seem to apply to this case,
11 is that right? You're referring to a criminal case but
12 this is a civil matter. Right?

13 MR. GORDON: Yes. No, I'm saying he willfully
14 failed to timely respond in order to gain an advantage in
15 his criminal case. The case law is clear that you cannot
16 fail to timely respond in order to gain an advantage in
17 other litigation.

18 THE COURT: Understood, but based on a letter
19 that was filed back in October by defense counsel, they
20 had asked for leave to respond to the complaint within a
21 short period of time. So I'm not seeing where the gain
22 is in terms of this delay you're referring to. I don't
23 understand what you're referring to.

24 MR. GORDON: Your Honor, Defendant Petty never
25 requested an extension. That was Defendant Maraj. He

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1 never requested an extension. It's also unknown why
2 Defendant Maraj's attorney couldn't ask or seek an
3 extension for Defendant Petty at the time, nor why they
4 couldn't have been jointly represented. I mean that's
5 obviously their own --

6 THE COURT: Let's make sure we're all on the
7 same page then. Look at docket number 24 and let me know
8 when you have it in front of you.

9 MR. GORDON: Okay.

10 (Pause in proceedings)

11 MR. GORDON: I apologize, your Honor.

12 THE COURT: Take your time.

13 MR. GORDON: Yes, I have those, your Honor.

14 THE COURT: Okay. And you'll see in the letter
15 defendant indicates that he's going to seek leave to
16 serve a response to the amended complaint. Do you see
17 that in the middle?

18 MR. GORDON: Yes.

19 THE COURT: Okay. So interpret that as
20 defendant asking for more time to respond to the
21 complaint, right?

22 MR. GORDON: Well yeah, I guess he expressly
23 didn't ask for more time but I guess it could be inferred
24 from what was stated. But at that point we had already
25 concluded that his failure to timely respond was willful.

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1 THE COURT: Okay. But certainly this is still
2 within the 30 day time period by which you would have
3 given him additional time to respond to the complaint,
4 right?

5 MR. GORDON: Yes, I mean that's what I would
6 have given him before knowing that he was going to
7 willfully delay. And therefore, we cannot trust that he
8 will not do the same when we serve discovery responses or
9 cause delays in any other way. He has not shown that we
10 can trust his word at all.

11 THE COURT: Okay. Go ahead. Continue.

12 MR. GORDON: Yes. So your Honor, the second
13 prong for entering a default judgment against the
14 defendant is whether defendant has a meritorious defense.
15 As already stated, the defendant pled guilty to attempted
16 rape, your Honor, but we understand and we note there is
17 no physical documentary evidence showing that Defendant
18 Petty did not rape our client. His mere defense is that
19 he pled to attempted rape which as you know often times
20 people plead to lesser charges as part of their plea
21 deal. He still was required to register as a sex
22 offender. He was still charged as an adult at only 16
23 years old. The evidence was clearly substantial enough
24 to label him for the remainder of his life as a sex
25 offender.

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1 What Mr. Petty did to our client is absolutely
2 horrendous and besides, as I said, his conclusory
3 denials, he's offered no evidence that what Ms. Hough
4 alleges occurred, did not occur. Therefore, the second
5 prong also weighs in plaintiff's favor.

6 With respect to the last prong, which is
7 prejudice, the most prejudicial are about Mr. Petty
8 failing to timely respond and now us not knowing whether
9 he is going to cooperate in the discovery process. In
10 fact, Mr. Petty may be serving significant jail time once
11 he is sentenced. His plea agreement does not state the
12 exact amount of time that he is to serve. However, it
13 will be left to the judge's discretion. However, we
14 believe that he will be serving at least some jail time
15 based on his prior offenses and the very fact that, you
16 know, the judge over there knows that 27 years later he
17 started harassing his victim for which he is required to
18 register as a sex offender. So your Honor --

19 THE COURT: Mr. Gordon, I have another question
20 for you. Now, an argument is being raised that in your
21 request for a default against the defendant that you
22 failed to comply with Local Rule 55.1 which required you
23 to have included an affidavit of service with your
24 request for the default. Am I understanding your papers
25 that you concede that you failed to comply with that

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1 local rule?

2 MR. GORDON: Your Honor, any failures with
3 respect to the local rules were minor technicalities in
4 our opinion, your Honor, and we cured all of them in our
5 declaration submitted with our motion for entry of a
6 default judgment. And the Second Circuit has made it
7 clear that in *Holtz v. Rockefeller & Co.*, 258 F.3d 62
8 (2d Cir. 2001) that the district court has discretion to
9 overlook the requirements of local rules. In *Feel Better*
10 *Kids v. Kids in Need*, No. 06-cv-0023, 2012 WL 448300
11 (EDNY Aug. 28, 2012), this Court held, "Where a party has
12 notice of a motion for an entry of default judgment, it
13 is appropriate to excuse the certificate of default
14 requirement and proceed to the rule on the motion for
15 default judgment.

16 So as such, if it is appropriate to -- if it
17 can be appropriate to ignore the rule for us to get a
18 default judgment altogether, any minor technicalities are
19 we believe insufficient to vacate a certificate of
20 default and to deny motion for entry of default judgment.

21 THE COURT: Understood. Just so I'm clear
22 though, are you acknowledging that you failed to comply
23 with the local rule?

24 MR. GORDON: We are acknowledging that -- I
25 don't see that certain aspects may have been followed to

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1 the strict interpretation of the rule, but I still
2 believe that in essence we complied with it.

3 THE COURT: Okay. Understood. Now help me
4 understand, do you know why that provision is in the
5 local rule, the affidavit of service requirement?

6 MR. GORDON: I believe that why it's in there
7 because they want to ensure that default is not
8 improperly entered.

9 THE COURT: Okay. Is it also your
10 understanding that that rule is in there to ensure that
11 the defendant was actually properly served?

12 MR. GORDON: Yes, yes. And I believe we showed
13 that in our declaration. I still think the service of
14 process affirmation that was -- affidavit that was
15 submitted with our request for a certificate of default
16 showed that service was properly effectuated.

17 THE COURT: All right. Now, do you know
18 whether he was served with the complaint or the amended
19 complaint?

20 MR. GORDON: Yes, he was served with the
21 summons and the amended complaint on September 15, 2021
22 at his home in (indiscernible), California.

23 THE COURT: Okay. Understood. All right.
24 Anything else you'd like to add?

25 MR. GORDON: No. I mean at this time, your

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1 Honor, we believe that it is appropriate to move forward
2 with an inquest hearing and determine damages for the
3 harms caused to Ms. Hough.

4 THE COURT: Okay. Now you cited a number of
5 Second Circuit precedent a view minutes ago. You're also
6 aware that the Second Circuit has made it very clear that
7 its preference is for cases to be adjudicated on the
8 merits as opposed to through default proceedings. Do you
9 understand that?

10 MR. GORDON: Yes, yes, I understand that. And
11 you know, obviously we want to follow the law and in this
12 case do not believe that, you know, that the favor
13 towards adjudicating the case on the merits is warranted.
14 We believe that the willful failure to respond to the
15 complaint here is so egregious and not satisfactorily
16 explained that default judgment is proper and justified.

17 THE COURT: All right. Mr. Isser, I'll hear
18 from you.

19 MR. ISSER: Thank you, your Honor. Before I
20 kind of go through methodically all of the reasons
21 plaintiff's motion should be denied and our motion to
22 vacate should be granted, I'd like to briefly respond to
23 some of the things plaintiff's counsel said.

24 First, this whole issue that it was important
25 for my client's sentencing or criminal case that the

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1 plaintiff recant the rape allegations, it's just not
2 accurate. It's not relevant to the crime charged of
3 failing to register. It's a question of whether my
4 client registered or did not. And my client has said
5 that that's his understanding in his declaration. So I
6 just want to make that clear.

7 And also, the main argument on willfulness I
8 still don't understand is that they believe by defaulting
9 in this case it would somehow give my client an advantage
10 in the criminal case. I raised this when we were first
11 discussing the motions against Ms. Maraj and plaintiff's
12 then counsel stated how the interactions with the
13 plaintiff here would affect his sentencing. I don't
14 think that that's necessarily true either. I don't think
15 they're taking that into account. Even if they were,
16 that doesn't explain how defaulting in this case would
17 hurt him in the criminal case or help him in the criminal
18 case rather. I understand why they think their complaint
19 might hurt him. I don't understand how a default would
20 help him.

21 And it's further -- and if it would help him,
22 then why have I appeared? Why have we fought to vacate
23 the default? My client put in a declaration denying all
24 of the material allegations. So clearly putting in an
25 answer which denies the material allegations would not

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1 have hurt him. And I think there's an argument to be
2 made that defaulting in this case could have hurt him. I
3 don't understand how defaulting here somehow would get
4 him an advantage in a criminal case. It's a separate
5 charge and actually the linchpin of their entire
6 argument.

7 They also mention my client didn't want to pay
8 a lawyer \$100,000. This misses the point. The concern
9 is that these lawyers were overcharging him because his
10 wife was wealthy and famous. Someone needs a lawyer they
11 can trust. They don't want a lawyer who they believe is
12 going to be ripping them off basically and someone that
13 can be trusted. No one argued, he never argued the
14 question of how much money. It was a question of trust.
15 The other attorneys that Mr. Gordon mentioned, they're
16 either in California or they don't do this type of work,
17 and that's in Mr. Petty's declaration. Part of the proof
18 of that is I'm here and not one of them. They don't
19 handle civil matters like this and he needed to find
20 other counsel.

21 On the attempted rape issue, they seem to want
22 to conflate rape with attempted rape again
23 misunderstanding the issue. The issue is because my
24 client was not convicted of rape, there's no preclusion.
25 He can deny that he raped, which he has. I don't know

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1 what type of documentary evidence is available when
2 somebody denies raping somebody but that's not even
3 necessary at this point. It's a very low threshold to
4 prove a meritorious defense and my client's denied the
5 allegations. It's sufficient that the meritorious
6 defense he will testify it was a consensual encounter and
7 he did not rape the plaintiff. And her own cousin gave
8 an interview which are attached to our papers stating
9 that. And we have other evidence when the time is right
10 hopefully if this default is lifted to present to
11 demonstrate my client's veracity.

12 The prejudice argument, less than 30 days we
13 were moving to vacate this default. I don't understand
14 how in 30 days plaintiff can claim prejudice. There's no
15 basis to believe he won't be truthful. They're
16 speculating. They're sure he's going to be in jail.
17 This is all pure speculation. And if my client were to
18 be sentenced, civil cases proceed with an incarcerated
19 defendant and there's no basis to conclude that he will
20 be subject to prison time.

21 And under 55.1, Local Rule 55.1, I just note
22 it's a little ironic throughout this case in emails and
23 in filings with the Court, plaintiff has accused
24 Defendant Maraj and my client to some extent of believing
25 they're above the law due to Ms. Maraj's fame and wealth.

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1 Here plaintiffs are basically asking this Court to
2 place -- plaintiff rather is asking this Court to place
3 her above the law and ignore the requirements of Rule
4 55.1.

5 Now turning more to going through all of the
6 arguments, your Honor, it's well settled a default
7 judgment should be a last resort, not a first resort.
8 Plaintiff has made this a first resort. Five days after
9 the complaint would have been due had it been properly
10 served, he sought a default. Ms. Maraj asked for an
11 extension. They denied Ms. Maraj an extension. They
12 knew I would seek leave to amend -- I was seeking leave
13 to respond to the complaint. They still went forward.
14 These are common courtesies granted to attorneys in
15 litigation, a 30-day extension as we're now told I would
16 have been granted even though Ms. Maraj was not.

17 They repeatedly, and the plaintiff knows this
18 because they're aware there complaint lacks merit.
19 That's why there's this rush to a default judgment.
20 That's why in the papers they talk about anything but my
21 client and whether a default should be entered. They
22 consistently and repeatedly raise his criminal history in
23 an attempt to smear him and distract the Court. They go
24 into irrelevant tangents on this. They accuse him of
25 perjury which is not the case. All of this is to hide

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1 the fact that this case should be litigated on the merits
2 and when it is, I believe we will prevail.

3 And there are numerous legal reasons in case
4 law to vacate the default. First, there was not proper
5 service on my client. That's not only grounds to vacate
6 the default, that requires dismissal of the case.
7 There's also the failure to comply with Local Rule 55.1
8 as your Honor mentioned. Not even the declarations put
9 in by the process server refer to the amended complaint.
10 We're unclear still which complaint they're claiming was
11 served. In addition -- I'm sorry, your Honor, there's a
12 phone ringing in the background.

13 And finally, your Honor, we demonstrated good
14 cause. We've shown, I'll explain, the default was not
15 willful. We have meritorious defenses. And there's no
16 prejudice to plaintiff.

17 Now the plaintiffs voluntarily dismissed the
18 case against Ms. Maraj and frankly I wonder why when our
19 case on the default, particularly and often on other
20 issues are very identical to Ms. Maraj's case.

21 Now, turning to service, your Honor, it's
22 beyond doubt now that the one piece of inaccurate
23 testimony provided the Court was the original affidavit
24 of service submitted by plaintiff stated that my client
25 was personally served. As Mr. Diaz, the process server,

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1 then put in a declaration in which he admitted to leaving
2 the papers outside my client's door. Now, the plaintiff
3 repeatedly accuses my client of perjury and uses that as
4 a basis for a lot of his argument in his papers because
5 Mr. Petty testified truthfully and accurately that no one
6 ever tried to hand him a complaint, an amended complaint,
7 or any other document in this litigation. That testimony
8 is truthful. He was responding to an affidavit of
9 service that he was personally served which he was not.
10 And the declaration of Mr. Diaz comes in that is still
11 truthful. Mr. Diaz admits he never came into immediate
12 proximity, physical proximity or close proximity with Mr.
13 Petty, never spoke to Mr. Petty. He just claims to have
14 seen him through a window and he left the papers outside
15 the door. He never held out his hand to my client and
16 tried to provide with the papers. He never threw them at
17 my client's feet. You never touch the papers. These are
18 some of the -- punched my client with the papers. Simply
19 put, he never tried to hand my client the papers.

20 Plaintiff seems to be arguing that if Mr. Petty
21 was in the house and if he opened the door and Mr. Diaz
22 would have tried to hand of the papers. None of that
23 happened. There's no dispute none of that happened. And
24 this is just another attempt by plaintiffs to smear my
25 client, falsely accuse him of perjury, and then try and

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1 use it as a linchpin for many of their other arguments
2 which are also invalid.

3 Now, turning to the issue of service, Mr. Diaz
4 claims that he went to serve my client. No one answered
5 the door. Went to the security booth of the complex, or
6 whatever it's called, and then found out my client was
7 home. Went back to serve my client 15 minutes later.
8 Saw him through the window. Told him he was serving the
9 two documents and left them on the doorstep. So
10 according to Mr. Diaz, he made one failed attempt at
11 service and then on the second attempt 15 minutes later
12 on the same day not being in physical proximity of my
13 client, left the papers on the doorstep. That is not
14 good service under any of the applicable laws. Plaintiff
15 would have served my client to the federal law,
16 California law, or New York law. They failed to
17 effectuate proper service under any law.

18 Federal law is clear, and I cite the cases in
19 my paper, you need first to have made several attempts to
20 serve the defendant before leaving the papers somewhere
21 or leaving the papers at his feet, and you need immediate
22 proximity. Often the defendant will hold back his arms.
23 You can then throw them at his feet. Defendant opens the
24 door, sees the process server, then slams the door, you
25 now have immediate proximity, you can leave them outside

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1 the door. None of that happened here. Plaintiff has not
2 cited a single case where either on the second attempt
3 after the first fail the process server left papers at
4 the defendant's feet or doorstep, and plaintiff has not
5 cited a single federal case in which leaving them on the
6 doorstep without being in physical proximity to the
7 defendant would be held to be good service. And in the
8 *Scotland* case which I cite which are facts very similar
9 to here except the process server actually made more
10 attempts and had more interaction with the defendant,
11 service was held to be ineffective as it is here.

12 California law is very clear personal service
13 under California law requires physically handing the
14 paper to a defendant which did not happen here.
15 California law has a statute right on point concerning
16 substitute service for leaving the papers at the
17 doorstep. That statute requires that the papers be
18 mailed after they're left at the doorstep. There's no
19 dispute the papers weren't mailed. That right there
20 renders service ineffective. In addition, California law
21 requires two or three attempts at service before using
22 substitute service and there was only one failed attempt
23 and only 15 minutes later is when they left it. So it's
24 not two failed attempts or three failed attempts.

25 So for either of those reasons, there's no

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1 service under California law.

2 And New York law, it's the same arguments.
3 Cases cited by plaintiff, the Court notes still required
4 a physical proximity to the defendant which is absent
5 here. Nor can plaintiffs use mail, any mail service
6 under New York law, substitute service, because they
7 didn't affix the summons and complaint to the door, they
8 just dropped it there and they didn't mail it
9 subsequently which is required.

10 So for the same reason that service is bad
11 under federal law and California law, it also fails under
12 New York law. And this in itself requires dismissal, not
13 just vacating the default.

14 Your Honor, the Rule 55.1 argument your Honor
15 is obviously well aware is that I'll note that in the *J&K*
16 *Sport Production* the Court specifically held that you
17 can't rely on documents scattered throughout the docket
18 to get a certificate of default which is exactly what
19 plaintiffs did. Their argument that they had previously
20 filed the affidavit of service somehow makes this
21 excusable, there's a case right on point to note that's
22 not proper.

23 And I'll note that there are numerous cases in
24 which a court decided not to exercise discretion and to
25 not forgive a 55.1 rule violation. And here where it's

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1 only six days, five days rather after a default, I think
2 there's even more grounds to require technical
3 compliance.

4 Now concerning good cause, as the Court is
5 aware, there's three factors. Willful, the default was
6 willful; whether there is a meritorious defense; and
7 whether there's prejudice. All three factors weigh in
8 favor of vacating the default, but no single factor is
9 dispositive. Plaintiffs argue that willfulness in and of
10 itself requires, you know, a default being granted and
11 I've cited cases that demonstrate this is not the case.
12 And willfulness actually demonstrates default should be
13 vacated. The default must be egregious to be willful.
14 Negligence isn't enough, or gross negligence.

15 My client demonstrates that it was not willful
16 as we've been discussing. He had trouble finding an
17 attorney. His wife was looking for an attorney and the
18 attorney his wife was hiring, Mr. Bernstein, said he
19 would help my client get an attorney. There was a
20 miscommunication between my client's wife and Mr.
21 Bernstein. He was retained later after the answer would
22 have been due if they had been served. I was then -- Mr.
23 Bernstein then referred Mr. Petty to me and I entered an
24 appearance. There's numerous cases saying a
25 communication between -- a miscommunication demonstrates

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1 a default is not willful.

2 Further demonstrating a default is not willful
3 is the timing. This is not a case where the defendant
4 did not react or respond in any way for months and months
5 or years and years. I appeared in this case and sought
6 to lift the default, the certificate of default, I
7 believe six days after it was entered. If I'm getting
8 the dates wrong, it's within weeks. And less than a
9 month after the complaint would have been due. We're
10 talking days and weeks here, your Honor, and that kind
11 of -- there's numerous cases cited in my brief that
12 demonstrate fighting a default as soon as becoming aware
13 of it, your Honor, opposing a motion for a default even
14 demonstrates the default is not willful. And here we
15 didn't even wait for the motion for a default. We sought
16 to vacate the certificate of default soon after it was
17 filed. So I think willfulness is in our favor.

18 Plaintiff's other argument concerning
19 willfulness that somehow it's a strategic advantage, I
20 discussed that defendant was aware of the case. We're
21 not claiming he was not aware of the case. We're
22 claiming he had difficulty obtaining counsel and then
23 there was a miscommunication of counsel. So I think
24 willfulness is in our favor.

25 We've also demonstrated meritorious defenses,

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1 your Honor, a very low threshold. Even a hint of
2 suggestion that we will prevail at trial with our
3 defenses is sufficient to establish a meritorious
4 defense. We don't need documentary evidence and whatever
5 else plaintiff believes we should have included. My
6 client's testimony in his declaration is sufficient.
7 It's not conclusory when it comes to the defenses. He
8 denies the allegations of rape, he denies ever asking
9 someone to contact plaintiff. With Mr. Black he says
10 straight in the declaration, although he gave him the
11 phone number, he said don't communicate with plaintiff.
12 He denies all the material allegations and he does so
13 with as much detail as possible based on the vagueness of
14 some of the allegations. He is unaware of the attorney's
15 contacting the plaintiff or allegations like that, but he
16 denies that he ever asked anyone to contact plaintiff.
17 And in fact, he told Black not to contact plaintiff. So
18 there is a sufficient defense to both the rape, the
19 alleged rape and his denials of that, and concerning the
20 alleged intimidation and harassment claim.

21 In addition, there's a statute of limitation
22 issue because the only way this occurred in 1994, the
23 alleged rape, and it's a three-year statute of
24 limitations, and the tolling provision plaintiff relies
25 on would only apply if they prevailed on the rape.

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1 There's no other forcible touching which is the only
2 other sexual offense within the statute. My client
3 denies the rape so we also have a statute of limitations
4 defense. And I think your Honor read the papers so I'm
5 going to try and move on, but we have other meritorious
6 defenses showing that the Georgia law claims and
7 California claims are not valid and many of the
8 allegations in the complaint don't even concern my client
9 or improper conduct. So that's all covered in my papers.

10 In addition, there's no prejudice here if the
11 default was vacated. The case is right on point and a
12 short period, here 30 days. It's hard to see how there'd
13 be loss of evidence, increased difficulties in discovery
14 or greater opportunity of fraud in only 30 days. Their
15 whole argument in their papers on prejudice just tries to
16 bring up my client's criminal history for false
17 allegations of perjury and say well, he's a bad guy, you
18 shouldn't trust him, so you know, he's not going to
19 cooperate. All of these arguments are based on pure
20 speculation. I have cases saying you can't base your
21 arguments on pure speculation.

22 And their argument fails as a factual matter as
23 well. They have an insulting argument that somehow I'm
24 colluding or I was colluding with Ms. Maraj's counsel.
25 Frankly, your Honor, that's insulting. They claim

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1 somehow Mr. Bernstein was worried when they threatened a
2 traverse hearing. A traverse hearing would have helped
3 us. It would have shown that Mr. Diaz gave a false
4 affidavit of service. But putting that aside, the two
5 defendants are a husband and wife. I would assume their
6 attorneys would be in touch and work together on common
7 issues in defending a litigation. In fact, I know Mr.
8 Bernstein and have worked with him over the years. It's
9 a benefit to that type of cooperation. I think it's
10 insulting to claim it's somehow suspicious for this and
11 we're colluding and I think beneath the dignity of
12 plaintiff's counsel to have made such a spurious
13 allegation against Mr. Bernstein and me. But there's no
14 basis for it in fact and it's completely common for co-
15 defendant counsels to work together concerning common
16 issues.

17 I think, your Honor, I'm trying to -- I know
18 you're familiar with the papers, so I believe I spoke too
19 fast and tried to get through it, but I mean the rest of
20 my argument is in my papers and I don't want to take
21 up too much of the Court's time.

22 THE COURT: Understood. Yes, I reviewed all
23 the papers. Question, if this case were to move forward
24 on the merits, do you intend on answering or moving to
25 dismiss? What's your intention?

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1 MR. ISSER: Well, we would move to dismiss on
2 the service issue, your Honor. As you can see, we
3 believe service is not effectuated and we've already
4 briefed on that issue in these papers, so I would
5 anticipate a motion to dismiss for ineffective service.

6 THE COURT: And if you were approached by
7 plaintiff's counsel to waive service, how would you
8 respond?

9 MR. ISSER: I would have to discuss that with
10 my client, your Honor. That's a decision obviously a
11 lawyer needs a client to consent to be able to make and I
12 have not discussed that issue with my client.

13 THE COURT: Okay. Understood.

14 MR. ISSER: I would be -- I do think that if
15 plaintiff asked I would have an ethical obligation to
16 approach my client and ask him if he wants to waive
17 service, but I don't want to speculate as to what the
18 client's reaction would be.

19 THE COURT: Understood. All right. Mr.
20 Gordon, quick question for you. As you sit here today,
21 do you believe service has been effectuated on Defendant
22 Petty?

23 MR. GORDON: Yes. Yes, I believe service was
24 proper, your Honor. And I don't think they've shown by
25 clear and convincing evidence, which is the standard as

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1 repeatedly stated actually in the cases cited by
2 Defendant Petty to rebut a process server's affidavit of
3 service. In most of the case law except for one
4 California case where it says two to three attempts may
5 be required in order to substitute service by leaving it
6 outside of someone's front door when it's opposed by the
7 defendant trying to avoid service.

8 However, the federal cases do not require any
9 certain amount of attempts. In fact, actually they only
10 require that just a reasonable effort was made to serve
11 the defendant, and reasonable effort was made.

12 Our process server, Mr. Diaz, he tells
13 explicitly what occurred when he arrived at the
14 defendant's home and the fact that he -- the first time
15 no one answered the door he returned back to the security
16 guard's post and overheard Defendant Petty arguing with
17 the security officer because he had let Mr. Diaz in. It
18 was clear from that point that Defendant Petty was trying
19 to avoid service. And the security guard also advised
20 Mr. Diaz that he was indeed home. Defendant Petty does
21 not decline that he saw -- he does not deny that he saw
22 Mr. Diaz through the window. The only thing that he
23 denies is that Mr. Diaz tried to hand him the summons and
24 amended complaint. Your Honor, he could not effectively
25 reach out his hand and try to hand it to him because

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1 Defendant Petty had interposed a door between them.
2 Therefore, that argument is insufficient and it's clearly
3 not clear and convincing evidence to rebut the
4 presumption of proper service.

5 Moreover, Defendant Petty does not deny that he
6 was served. He just denies that the summons and amended
7 complaint weren't handed to him. Defendant Petty does
8 not deny having knowledge of the lawsuit. Defendant
9 Petty does not deny that he knew when he needed to
10 respond by. All of these things Defendant Petty would
11 have learned from being served with the summons and
12 amended complaint. So I don't see how there is any
13 grounds to rebut the presumption of proper service year.

14 Furthermore, Mr. Diaz mailed a copy of the
15 summons and amended complaint to Defendant Petty's wife.
16 As you know, they live in the same residence. I don't
17 know how many times Defendant Petty believes needs to
18 be -- you know, he needs to avoid service before we can
19 try to serve him by any means possible which is by
20 leaving it outside the door. Mr. Diaz even showed him,
21 not just yelled to him that you are being served, he
22 showed him the documents through the window and then
23 placed them outside of the door. This is not --
24 Defendant Petty did not deny that this occurred.

25 THE COURT: Okay. Mr. Gordon, I'll give you

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1 the last word. Anything else you'd like to add in terms
2 of your argument?

3 MR. GORDON: Yeah. So I just want to add that,
4 you know, opposing counsel did concede that Defendant
5 Petty deliberately did not respond that he could not
6 obtain a lawyer that he could trust. That is not a
7 sufficient excuse to ignore the timing requirements to
8 respond to the complaint. He did not say that he was
9 unaware of the lawsuit. And sorry for repeating myself,
10 but he does not deny he was unaware of the lawsuit and
11 when he needed to respond nor that he could have found
12 counsel or sought an extension to respond on time.

13 Last, the fact that a meritorious defense is
14 such a low bar and still Defendant Petty cannot meet it
15 is very telling. Conclusory denials are insufficient and
16 the courts have made that very clear. I can cite some
17 cases if you'd like. But those conclusory denials are
18 not sufficient. We're not asking him to prove the case.
19 That is not required. And we're not saying that that's
20 required. However, he does need to show more than
21 conclusory denials to prevail on that prong.

22 And lastly, your Honor, we want to add that
23 Defendant Maraj was -- we voluntarily dismissed Defendant
24 Maraj because she had shown evidence that we believe
25 demonstrates that jurisdiction is not proper in this

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1 court. So as is our duty once we had evidence of that,
2 we had to voluntarily dismiss the case under Rule 11 and
3 we plan to re-bring it in a court of proper jurisdiction.

4 THE COURT: Okay. Understood. Now if you
5 intend to re-file that action in another jurisdiction, do
6 you intend this case to follow as well?

7 MR. GORDON: No. We are considering whether to
8 voluntarily dismiss the causes of action that are related
9 to Defendant Maraj as well and bring those together
10 against Defendant Petty and Defendant Maraj in
11 California, but we still believe that we have grounds,
12 the grounds exist and default judgment should be entered
13 against Defendant Petty in this case at least for the
14 causes of action related to 1994.

15 THE COURT: Okay. Understood. Let me re-ask
16 the question in a different way. If you re-file against
17 Defendant Maraj in another jurisdiction and if this case
18 goes forward on the merits, do you intend to dismiss this
19 action and consolidate the allegations in this case with
20 your re-filed case elsewhere?

21 MR. GORDON: We have not thought that far, your
22 Honor. We are concerned with delaying discovery in this
23 case any longer. Specifically with respect to the cause
24 of action related to 1994 we believe that the evidence,
25 you know, as that occurred in New York and the evidence

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1 is here, we believe this court is proper for those causes
2 of action and we would certainly not consolidate them.

3 THE COURT: Okay. Understood. All right. I
4 want to go off the record for a minute, so I'm going to
5 stop the recording and then I'm going to put all of you
6 into a separate breakout room. Okay? So hang tight.
7 Hold on one second.

8 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 21st day of January, 2022.



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